APPEAL NO. 141092
FILED JULY 17, 2014

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 4, 2013, with the record closing on April 11, 2014, in San Antonio, Texas, with Carol A. Fougerat presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant/cross-respondent (claimant) did not have disability resulting from the injury sustained on [date of injury], beginning February 8, 2013, and continuing through the date of the CCH; (2) the compensable injury of [date of injury], extends to left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia; (3) the claimant has not reached maximum medical improvement (MMI); (4) because the claimant has not reached MMI, no impairment rating (IR) can be assigned; and (5) the first MMI/IR certification from (Dr. B) did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The claimant appealed the hearing officer's disability determination on a sufficiency of the evidence point of error. The respondent/cross-appellant (carrier) responded to the claimant's appeal, urging affirmance of the hearing officer's disability determination.

The carrier filed a cross-appeal, appealing the hearing officer's determination regarding the extent of the compensable injury, as well as the hearing officer's determination that the claimant has not reached MMI and therefore no IR can be assigned. The carrier contended that the hearing officer's determinations are erroneous as a matter of law and not supported by sufficient evidence. The carrier also complained that the hearing officer failed to provide the parties with a copy of the Request for Designated Doctor Examination (DWC-32) when she held the record open to appoint a designated doctor. The claimant responded to the carrier's cross-appeal, urging affirmance of the hearing officer's determinations disputed by the carrier. The hearing officer's determination that the first MMI/IR certification from Dr. B did not become final under Section 408.123 and Rule 130.12 was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury in the form of bilateral knee contusions on [date of injury]. The claimant testified that he was

injured when the ladder upon which he was standing slipped and caused him to fall and land on both knees. It was undisputed by the parties that there was a gap in treatment from October 2010 to February 2013. It was also undisputed that a designated doctor had not been appointed on any issue prior to the December 4, 2013, CCH. The hearing officer held the record open to appoint a designated doctor. We note that the record does not contain a copy of the DWC-32 or an order appointing a designated doctor after the December 4, 2013, CCH, nor does the record contain any email correspondence between the hearing officer and the parties after the December 4, 2013, CCH.

DISABILITY

The hearing officer's determination that the claimant did not have disability resulting from the injury sustained on [date of injury], beginning February 8, 2013, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The Texas courts have long established the general rule that "expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience" of the fact finder. *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007). The Appeals Panel has previously held that proof of causation must be established to a reasonable medical probability by expert evidence where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. Appeals Panel Decision (APD) 022301, decided October 23, 2002. *See also City of Laredo v. Garza*, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing *Guevara*.

As previously mentioned, there was a gap in treatment from October 2010 to February 2013. The first medical record in evidence containing the diagnoses at issue in this case is an MRI dated March 29, 2013.

The hearing officer determined that the compensable injury extends to left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia. The hearing officer noted in the Discussion portion of the decision that "a substantial amount of time passed between the date of the injury and the diagnoses in dispute," and stated that "[t]he determination of the designated doctor regarding the extent of the compensable injury is supported by the preponderance of the evidence."

(Dr. C) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine the extent of the compensable injury, as well as MMI and IR. Dr. C examined the claimant on January 13, 2014. In his narrative

report, Dr. C noted that the DWC-32 listed the disputed conditions as: a right knee medial meniscus tear; severe lateral compartment osteoarthritis; left knee horizontal tear posterior horn medial meniscus with grade 2/3 chondromalacia; and moderate chondral thinning. However, on the Designated Doctor Examination Data Report (DWC-68) in evidence, the following were listed as the additional claimed diagnoses or conditions: right knee meniscus tear; left knee meniscus tear; contusion of left knee; right medial meniscus chondromalacia; knee severe lateral compartment osteoarthritis; and left knee osteoarthritis. Dr. C opined that the extent of the compensable injury included right knee meniscus tear; left knee meniscus tear; contusion of left knee; right medial meniscus chondromalacia; right knee severe lateral compartment osteoarthritis; and left knee osteoarthritis. Dr. C explained that:

> The mechanism of injury was a contributing factor in the aggravation and acceleration by the claimed incident. The forces involved direct impact as well torsion while load bearing on both knees. The [claimant] suffered an injury on the date of the claimed incident in 2010 and continues to have ongoing symptoms associated with that injury. He suffered from a fall off of a ladder, causing a direct impact to both knees while also having a compression of both the knees. It is my opinion that the arthritis and chondromalacia have been accelerated and aggravated by this injury and the forces generated by this injury also caused tears of the meniscus.

Although he generally discusses chondromalacia and the tears of the meniscus, Dr. C does not give an opinion regarding the specific conditions at issue in this case, which are a left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia. Furthermore, Dr. C does not explain how the claimant's fall on [date of injury], would result in the conditions of left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia that arose in February 2013, which was approximately two years and seven months after the claimant's fall. It was undisputed that there was a gap in treatment from October 2010 to February 2013, and that the conditions at issue were diagnosed in an MRI dated March 29, 2013. There is an attenuation factor in this case. Dr. C does not address the two and a half years the claimant went without treatment between the date of injury and when he again sought treatment for the claimed conditions.

The record does not contain an explanation of how the claimant's fall on [date of injury], caused left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia arising in February 2013. The hearing officer's determination that the compensable injury extends to left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Accordingly, we reverse the hearing officer's determination and render a new decision that the compensable injury of [date of injury], does not extend to left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The hearing officer determined that the claimant has not reached MMI and as such no IR can be assigned based on the certification of Dr. C, the designated doctor.

As mentioned above, Dr. C examined the claimant on January 13, 2014. Dr. C opined in his narrative report that the claimant has not reached MMI, and that ". . . a reasonable future course of care would include surgery and post-surgical rehabilitation. [The claimant] has surgical lesions and all conservative care has failed to improve his condition."

As explained above, we have rendered a new decision that the [date of injury], compensable injury does not extend to left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia. The parties have stipulated that the claimant sustained a compensable injury in the form of bilateral knee contusions. Dr. C has considered conditions that are not a part of the compensable injury, and therefore his MMI/IR certification cannot be adopted. Accordingly, we reverse the hearing officer's determinations that the claimant has not reached MMI and as such no IR can be assigned.

There are three other MMI/IR certifications in evidence. The first is from Dr. B, the treating doctor. The Report of Medical Evaluation (DWC-69) in evidence from Dr. B states that Dr. B examined the claimant on [date of injury], and certified that the claimant reached MMI on that same day and that the claimant had no permanent impairment as a result of the compensable injury. However, Dr. B's DWC-69 contains no signature. The reporting requirements of Rule 130.1(d)(1) provide that a certification of MMI and assignment of IR for the current compensable injury requires the "completion, signing and submission of the [DWC-69] and a narrative report." Rule 130.1(d)(1)(A) states that the DWC-69 "must be signed by the certifying doctor." That rule goes on to state that the signature may be "a rubber stamp signature or an electronic facsimile signature." *See* APD 042044-s, decided October 8, 2004, APD 061017, decided July 14, 2006, and APD 100510, decided June 24, 2010. Accordingly, Dr. B's unsigned MMI/IR certification cannot be adopted.

The second MMI/IR certification is from (Dr. G), a doctor selected by the treating doctor to act in place of the treating doctor. Dr. G examined the claimant on October 2, 2013, and certified that the claimant has not reached MMI. However, Dr. G makes clear in his narrative report that he based his opinion that the claimant has not reached MMI in part on the diagnosis of a tear of the medial cartilage or meniscus of the knee. This condition has not been determined to be part of the [date of injury], compensable injury; therefore, Dr. G's certification that the claimant has not reached MMI cannot be adopted.

The third MMI/IR certification in evidence is from (Dr. O), the post-designated doctor required medical examination doctor. Dr. O examined the claimant on March 20, 2014, and certified that the claimant reached MMI on August 11, 2013, with a zero percent IR. Dr. O explained his opinion as follows:

> Based upon the guidelines indicating that the length of disability for Very Heavy job classification would be up to 35 days, it would be my opinion the [claimant] would have been at [MMI] at that time. This would have placed the [claimant] at [MMI] on or about August 11, 2013. Based upon the diagnosis of contusions of the bilateral knees, the [claimant] would not have sustained any permanent impairment as a result of the alleged work related event of [date of injury].

It is clear from Dr. O's explanation above that he intended to place the claimant at MMI as of August 11, 2010, rather than August 11, 2013, based upon contusions of the bilateral knees. Because of the inconsistency between Dr. O's MMI date and his explanation of MMI above, his MMI/IR certification cannot be adopted.

As there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the claimant did not have disability resulting from the injury sustained on [date of injury], beginning February 8, 2013, and continuing through the date of the CCH.

We reverse the hearing officer's determination the compensable injury of [date of injury], extends to left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia, and we render a new decision that the compensable injury of [date of injury], does not extend to left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia.

We reverse the hearing officer's determinations that the claimant has not reached MMI and therefore no IR can be assigned, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the [date of injury], compensable injury. The hearing officer is to provide to the parties, and to admit into evidence, the DWC-32. The hearing officer is also to admit into evidence any correspondence between the hearing officer and the parties.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], extends to bilateral knee contusions as stipulated to by the parties. The hearing officer is also to advise the designated doctor that the compensable injury of [date of injury], does not extend to left knee horizontal tear of the posterior horn meniscus and grade 2/3 left patella chondromalacia as administratively determined.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI and rate the entire compensable injury in accordance with the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RICHARD J. GERGASKO, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge